Petition

Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

JACK VAN SICKLE,
Petitioner,

vs.

BETH VAN SICKLE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the Court of Appeal, State of California,
Fifth Appellate District

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QUESTIONS PRESENTED

The primary legal issue presented is whether a court may imply an agreement changing the character of separate property to community property where (1) no agreement in writing existed, (2) neither of the parties testified that the agreement found by the court existed, (3) the court implied a complicated agreement based upon what the court thought the parties must have intended.

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JACK VAN SICKLE,
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VS.

BETH VAN SICKLE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the Court of Appeal, State of California, Fifth Appellate District

Petitioner Jack Van Sickle prays that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, Fifth Appellate District, entered in this case on November 10, 1981. Said court denied a petition for rehearing on December 9, 1981. The Supreme Court of the State of California denied a petition for hearing on January 20, 1982.

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, Fifth Appellate District, printed in Appendix A hereto, is not reported as that court ordered it not reported. There is no reported opinion of the Court of Appeal denying a rehearing (see Appendix B hereto). There is no

reported opinion of the Supreme Court of the State of California denying a hearing (see Appendix C hereto).

JURISDICTION

The Court of Appeal of the State of California entered a judgment in this case on November 10, 1981. A timely petition for rehearing was filed on November 27, 1981. The petition was denied on December 9, 1981,

A petition for hearing in the Supreme Court of the State of California was timely filed on December 21, 1981. That petition was denied on January 20, 1982.

Petitioner invokes the jurisdiction of the court under subdivision (3) of section 1257 of Title 28, United States Code, since a right has been especially set up and claimed under the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutory law of the State of California and the Constitution of the State of California provide that property owned before marriage is the separate property of the person owning the same. *California Constitution*, Article I, Section 21. The Fourteenth Amendment to the United States Constitution provides that "no state shall deprive any person of . . . property without due process of law." The California trial court and the California Court of Appeal, Fifth Appellate District, have done so in this case.

STATEMENT OF THE CASE

Jack Van Sickle (hereinafter called "husband") and Beth Van Sickle (hereinafter called "wife") were married

on June 3, 1955 and separated nine years later on June 19, 1964. The trial court found, and such finding was affirmed by the Court of Appeal of the State of California, Fifth Appellate District, that certain separate property of husband was transmuted into the community property of the parties, even though the parties testified to different agreements from that found by the court. The property found to be transmuted was valued in 1973 somewhere between $2,225,000.00 and $3,075,000.00 and has appreciated many fold since that time.

Husband went to South Lake Tahoe, California in 1937 to stay permanently, working at the Lakeside Riding Stable for $1.00 per day and room and board. He was a man of vision and in 1941 purchased 508 acres, including the property on which the stables were located, for approximately $7,000.00. Payments on account of the purchase price were completed by April, 1946, those payments being made with husband's earnings from his stable and a guide service located on the property. Husband's property was and is located at the intersection of U. S. Highway 50 and the California-Nevada state line and extends upwards into the mountains. The property, we can see by hindsight, was in the path of progress.

Husband continued to operate his stable and hired wife in 1953 as a trail guide working for $150.00-$200.00 per month. Husband and wife were married on June 3, 1955. The trial court concluded that husband "must have intended to change the character of a portion of his separate property to community property by conceding community property interest to wife in what had been his separate

property. This concession, according to the trial court, took place prior to 1961. (S.C.T. 43:18—S.C.T. refers to Supplemental Clerks Transcript)

The community property interest was not created by a premarital agreement or a written or oral agreement after marriage, or by a commingling of assets, or by the efforts of either spouse based upon established apportionment formulas used under California law. Instead, the community property awarded to wife was created by a totally new theory not discoverable in any reported case because the court reasoned that community property should be created out of husband's separate property "because the community over the years by its effort and its support of the separate property earned its share thereof." The court did this by a process which completely erodes established legal principles relating to the manner in which the legal ownership of property is changed.

The reasoning processes of the trial court, which were affirmed by the Court of Appeal of the State of California, can best be demonstrated by quoting from the Intended Decision (Preliminary) and the Interim Ruling of the court. The trial judge bifurcated the trial and it was tried in two separate stages. Accordingly, the trial judge left a guideline as to the reasons for his decision because he wrote both an Intended Decision (Preliminary) (C.T. 425) and the Interim Ruling (C.T. 504) as to his thought processes in arriving at his conclusion that there was an "implied intent" to transmute husband's separate property to community property. Portions of the Trial judge's opinions

demonstrate the convoluted reasoning process used by him. He concluded:

> "The court is satisfied that there was no premarital agreement. . . ." (C.T. 426:2-3)
>
> "There was commingling of separate and community property but not of such a nature as to be of any benefit to Beth's contentions. . . ." (C.T. 426:11-13)
>
> "Neither allocation formula would produce any community interest here. . . . Either by judicial notice or by the evidence offered, the Court must conclude that the astronomical increase in value resulted from spontaneous enhancement due to the increased public interest in the Tahoe area, not to anything the parties did. . . . Very simply, this Court feels that as it understands and would apply the two approaches, neither is appropriate to the Court's true object of doing substantial justice in this case; and *neither approach would in any event achieve any change of character in the property.*" (Emphasis added) (C.T. 426:25-427-14)
>
> "This leaves the theory of transmutation. . . .
>
> "Initially it is clear that if the Court finds any such transmutation, such finding may be based upon all the circumstances, even if there is no express oral or written agreement. . . .
>
> "Of the two versions of a premarital discussion between the parties, the Court tends to believe the one put forth by Jack; to the extent at least that he did not fail to insist that his property, bought and paid for at great sacrifice before marriage, was and would remain his own. . . ." (C.T. 427:15-428:1)
>
> "Somewhere along the line, the iron will of Jack was softened. . . . He conceded to Beth a community in-

terest in what had been his separate property, and the Court finds that the extent of the concession was the real property which went into the aforementioned three corporations; this "was transmuted by agreement of the parties into community property. . . ." C.T. 429:10-19)

"Among the legitimate factors affecting this conclusion, we first have the setting for such a transmutation. The years of work and sacrifice by both parties and the financial burden they carried to improve and preserve this property *almost compels the inference that the minds must have come together. . . .*" (emphasis added)

". . . In any event, the background was ripe for an agreement, or at least a tacit understanding between the parties by which a community interest in Beth was recognized." (C.T. 429:31-430:13)

"I must be guided by my Intended Decision. I there found that the parties agreed that the properties of the three corporations were community properties, not by virtue of any gift but because the community over the years, by its efforts and its support of the separate property, *earned* its share thereof. . . ." (C.T. 505: 25-30)

The foregoing quotations which are selective, and intended to be selective, demonstrate the fallacy of the court's reasoning. In the first place, the trial judge in attempting to do what he thought was substantial justice misunderstood the substantial justice theory as set forth in *Beam v. Bank of America*, 6 C.3d 12 (1971). Transmutation has nothing to do with substantial justice; it relates to an agreement express or implied. Substantial justice, as used in the *Beam* case, relates only to which of the two approaches one will use in allocating separate and community property, *Pereira*

v. Pereira, 156 Cal. 1 (1909) or *Van Camp v. Van Camp*, 53 Cal.App. 17 (1921), and the court had already found specifically that neither of those established approaches would generate any community property. The *Pereira* case essentially holds that one may assess a fair return on the value of one's separate property in allocating a value to community property efforts and the *Van Camp* case holds that one may value the efforts of the individual involved.

The court thus concluded that the parties must have intended to change the character of husband's separate property to community property and implied a very complicated agreement which neither party testified to, neither party ever considered and the court awarded wife one-half of the developed 40 acres of the original 508 acre-parcel.

HOW THE FEDERAL QUESTIONS AROSE

The trial court determined that transmutation occurred because the community "earned it" and the court implied a very complicated agreement. There was no express gift of the property by husband to wife. No community property was created by premarital agreement as contended by wife. Community property was not created by commingling. Community property was not created by any apportionment theories under California law.

The trial court did find there was a "transmutation" or change in character of separate to community property because the community "earned" its share of husband's separate property. There was no mutual consent or a meeting of the minds even impliedly. Husband never conceded any portion of his property to wife, much less the

well defined portion the court found was transmuted. Wife never contended she was entitled to portions only of husband's property but she contended she was entitled to all of it.

The court then created a very complex agreement, finding that certain portions of husband's property were transmuted or changed to community property by an implied intent. The agreement was never considered by either party and was completely an agreement constructed by the court. The trial court concluded as a matter of law that taking husband's separate property from him by implying an agreement to change his separate property to community property was not a violation of his constitutional rights to due process of law. (Conclusion of Law No. 21; S.C.T. 55:21-26)

California Constitution, Article I, Section 21, provides:

> "Property owned before marriage . . . is separate property."

Both the Fourteenth Amendment to the United States Constitution and the California Constitution, Article I, Section 7, provide that a person may not be deprived of his property without due process of law. Due process in the taking of one's property certainly requires more than that a judge have an instinctive feeling that he should give a spouse something by way of community property because the community earned it, particularly where there is no formula or established basis for computing the value of that property earned. Due process, at the very least, requires that a person know the basis upon which his property may be taken from him.

Husband's right to maintain his separate property unless and until the same was transferred by some recognized judicial standard or by a constitutional state statute is a vested right and may not be taken from him by an arbitrary and capricious judicial act, or such taking constitutes a denial of due process and violates the Fourteenth Amendment. (*Estate of Thornton*, 1 C.2d 1 (1934); *Paley v. Bank of America*, 159 C.A.2d 500 (1958))

The federal questions arise out of the decisions of the California courts failing to protect husband from the state action of the California courts. (*Shelley v. Kramer*, 334 U.S. 1, 68 S.Ct. 896, 92 L.Ed. 1161 (1948)) The Supreme Court held in that case that a state acts within the scope of the Fourteenth Amendment when the state's judicial officers deny due process in connection with property rights. Husband's property, in this case, was taken from him without due process and based upon no known standards of state law simply because the trial court desired to make new law.

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

While the United States Supreme Court has repeatedly recognized that the whole subject of domestic relations generally belongs to the states and not to the laws of the United States, the Supreme Court has recognized that state court actions may deprive one of property without due process of law. *Shelley v. Kramer, supra*, and the court has recently intervened in domestic relations matters relating to pensions to protect property rights. *McCarty v. McCarthy*, ... U.S. ....., 69 L.Ed. 589, 101 S.Ct. ..... (1981)

The Court of Appeal of the State of California has determined by inference that there was no denial of due process in converting one-half of a substantial amount of the husband's separate property to the community property of the husband and wife. The Supreme Court of the United States has not previously determined the standards by which a person's property might be taken from him without his consent or agreement.

The Court of Appeal of the State of California relied heavily upon the case of *Kenney v. Kenney*, 220 Cal. 134 (1934) as a basis for its opinion. The case was totally inapplicable since that case contained a finding that the parties had an oral agreement. Every California case involving a transmutation of property had a finding of an oral agreement. For example, the Court of Appeal referred to *Woods v. Security First National Bank*, 46 C.2d 697 (1956). That court was dealing with an oral agreement and the court stated:

> "The findings of the court above quoted clearly show an oral agreement before marriage that decedent's property was to be community property. After the marriage it was agreed that her property 'had become' community property. This follows from the finding that decedent declared to *plaintiff* and others that the property *had become* community property, to which declaration plaintiff assented. . . . This is a clear case of an executed agreement which transmuted the property." (701)

No such findings were made by the trial judge in this case and in fact, he expressly made findings contrary to that fact.

The Court of Appeal of the State of California, as a parting comment, suggested that the problem with transmutation lies with the Legislature. (Appendix A at page 16) The court stated:

> "The judicially created doctrine of oral transmutation has been critiqued. (See 7 Witkin, Summary of Cal. Law (9th ed. 1974) Community Property, 6 73, p. 5161.) Although we might join in the criticism, any change must come from the Legislature."

Then the court concluded its opinion should not even be published. Yet, the net result of the decision is to transmute thousands of dollars of real property from the separate property of the husband to the community property of the parties without due process of law. No standards are set for the change in character of the property, the parties did not have an agreement and the case does not fall within any of the guidelines heretofore set forth by California courts for the changing of character of property.

Although the trial court found that there was no denial of due process, the Court of Appeal of the State of California failed to discuss the issue and although the specific issue was raised again by husband's petition for a hearing before the Supreme Court of the State of California, said Supreme Court denied a hearing.

CONCLUSION

For the reasons discussed above, we respectfully submit that a writ of certiorari should issue to review the decision of the Supreme Court of the State of California.

Dated: April 20, 1982

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(Appendices follow)

Appendix

Appendix A

Not to be Published in Official Reports

In the Court of Appeal of the State of California
Fifth Appellate District
5 Civil No. 4991
(Super Ct. No. 185679)

In re the Marriage of
Beth and Jack Van Sickle.

Beth Van Sickle,
Appellant,

v.

Jack Van Sickle,
Appellant.

[Filed Nov. 10, 1981]

Opinion

Appeal from a judgment of the Superior Court of the County of Sacramento. George E. Paras, Judge. Affirmed.

Anthony J. Scalora and Gregory F. Gilbert for Appellant wife.

Watson & Hoffe, Francis A. Watson, Jr., and Ronald A. Rubenstein for Appellant husband.

INTRODUCTION

Appellant/cross-respondent Jack Van Sickle (Jack or husband) again appeals[1] from a judgment awarding his former spouse, respondent/cross-appellant Beth Van Sickle (Beth or wife), a community property interest in the stock of 3 corporations controlling some 40 acres of developed and developable property at the intersection of U.S. Highway 50 and California/Nevada Stateline. The trial court made the award under a theory of an implied partial transmutation involving a portion of 508 acres purchased and paid for by husband prior to the parties' marriage. He further appeals from the judgment of the court below denying him recovery of certain unpaid corporate salaries for the years 1967 through 1969, investigator and attorney fees in a California child custody matter in 1968 followed by criminal conspiracy charges filed in California which were ultimately dismissed. Husband further disputes the finding below that there was no premarital agreement and the exclusion from evidence of an unsigned 1967 property settlement agreement between the parties.

Cross-appellant Beth conditionally abandoned her cross-appeal during oral argument, in the event this court affirmed the lower court decision.

The parties married June 3, 1955, and separated nine years later, on June 19, 1964. They had two children, Wayne and Hettie.

The husband had several parcels of real property as his separate property prior to marriage. Of special moment on

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[1]The disposition of Jack's first appeal is recorded at 68 Cal.App. 3d 728, a 1977 opinion.

this appeal are 508 acres of land in Douglas County, Nevada, and El Dorado County, California, located at the intersection of U.S. Highway 50 and California/Nevada Stateline and extending upward into the mountains (the Patterson Parcel), which he purchased in 1941 for approximately $7,000[2] from Laura D. Patterson; all payments on the property were completed by April of 1946, and at that time the property was deeded to Jack, who was then a single man.

Also deserving of mention are 240 mountainous acres (the Hansen Parcel) which were purchased on September 23, 1960. The parties stipulated at trial that the Hansen property, located in Douglas County, Nevada, was intended to be taken as community property.

Shortly after the purchase of the Hansen Parcel, additional property (the Bernhardt Parcel) was purchased by husband. A down payment of $3,000 on the $5,000 purchase price was made October 18, 1960; the purchase was completed May 9, 1961. Title was taken in the name of husband alone. This property was acquired to provide access to the commercially important portions of the Patterson Parcel (i.e., the 40 transmuted acres). For the same purpose was the purchase of property referred to as the Nosker Strip, purchased in 1954.

The 40 acres of the Patterson Parcel (and certain parcels contiguous thereto), which property during the parties' marriage was subdivided into a shopping center, apartments and resort facilities, was found to be transmuted

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[2]$13.78 per acre.

into community property sometime prior to completion of the commercial development in 1961. At the time of the court's finding in 1973, this property was valued at between $2,225,000 and $3,075,000.

On June 19, 1972, the trial court commenced a 23-day court trial on the nature and character of the property held by the parties, which concluded on July 24, 1972.

The court noticed a (preliminary) intended decision regarding the nature and character of the property held by the parties on February 1, 1973, and on July 30, 1973, the court commenced the second phase of the trial, a seven-day hearing on the remaining issues (accounting, child custody, etc.) in the case, which concluded August 17, 1973.

Pertinent findings of fact were entered June 6, 1974, and conclusions of law followed September 27, 1974. The court also entered a finding to the effect that due to the likelihood of an appeal, the existence of other litigation[3] and the fact that numerous consequences adverse to both parties would follow from an attempt to divide the property found to be community, no division of the community property would be made at that time. (Civ. Code, § 4800, subd. (a).)

An interlocutory judgment was entered September 27, 1974, dissolving the parties' marriage. The judgment contained numerous other judicial determinations: (1) other than the transmuted 40-odd developed and developable acres of the Patterson Parcel, with certain appurtenant easements and minor acquisitions, and the 240-acre Hansen

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[3]One of the three commercial corporations (Crescent V Enterprises, Inc.) was embroiled in lease litigation which accounts for the variation in value regarding the 40 acres in 1973.

Parcel which the parties stipulated to be community property, all other acreage was found to be husband's separate property; (2) wife was granted physical custody of Wayne and husband physical custody of Hettie, wife to receive $200 per month child support; (3) in light of the reservation of jurisdiction to divide the community property in the future and the current corporate litigation, the court ordered that proper adjustments in the amounts of community property to be awarded each party at the time of the division be made; (4) pending division of the community property, husband pay wife $3,000 per month which later was to be credited against wife's share of the community property; (5) the community bear a certain amount of the costs of both parties and (6) that each party bear his or her remaining costs and his or her attorney fees.

Both parties appealed from the judgment; *In re Marriage of Van Sickle* (1977) 68 Cal.App.3d 728 was the result.

Although the focal point of the prior appeal was the community property division, the issue was not reached and the appeal regarding the ultimate division of the community property was dismissed, since the court held that the lower court's decision delineating the community property of the marriage, without fixing the value of the assets or dividing the community property between the parties, was not made an appealable order merely because the decision was embodied in an interlocutory judgment of dissolution of marriage which was made appealable

by statute (Code Civ. Proc., § 904.1, subd. (j)[4]). (*In re Marriage of Van Sickle, supra*, 68 Cal.App.3d at pp. 734-739.) However, this court reversed the portion of the lower court judgment directing wife to repay husband in the future from her share of the community property all temporary spousal support payments made pursuant to pendente lite spousal support orders, holding that it was "in effect an impermissible attempt to modify the pre-existing temporary spousal support orders retroactively. [Citations.]" (*Id.*, at pp. 739-740.) The court affirmed the finding regarding the invalidity of a Nevada divorce decree previously procured by husband (*Id.*, at p. 740) and subsequently rejected all of the arguments raised by husband in his petition for a rehearing (*Id.*, at pp. 741-743.)

Husband's petition for a rehearing by the Supreme Court was denied June 9, 1977.

STATEMENT OF THE CASE—POST 1977

The third phase of the trial was an informal session held in chambers on April 12, 1979. The apparent purpose of the hearing was to receive certain stipulations, which would lead to further findings and conclusions, and the ultimate entry of a supplemental judgment following

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[4]The following year (1978) the Legislature amended Code of Civil Procedure section 904.1, subdivision (j), to read as follows, effective July 11, 1978: "An appeal may be taken from a superior court in the following cases: [¶] (j) From an interlocutory judgment of dissolution of marriage, including the provisions thereof determining the separate, community, or quasi-community character of the parties' properties, *regardless of whether the court in such judgment has reserved jurisdiction pursuant to Section 4800 of the Civil Code to value or divide all or a portion of the community or quasi-community property.*" (Emphasis added.)

retrial after appeal. Keeping in mind this court's opinion in *Van Sickle I*, the court accepted a stipulation and ordered that husband be reimbursed for temporary spousal support ($26,800) from the community property, rather than from Beth. (*Id.*, at p. 742.) The parties further stipulated that the court could retain jurisdiction and the court ordered there be no present division of the community property, "because of a series of complex factors, including but not limited to problems with governmental agencies at South Lake Tahoe, including City of South Lake Tahoe, Tahoe Regional Planning Agency and C.T.R.P.A., those problems relating to—or affecting easements and roadways surrounding the property, which [were] found to be community property . . . and [because of] the fact that both parties have represented to this Court that an appeal would be taken from the judgment, . . ."

The April 12, 1979, record reflects court and counsel traveled to South Lake Tahoe and viewed all of the properties, particularly the properties held by the various Crescent V corporations, following remand from this court.

The existing spousal support order was terminated without opposition from wife's counsel. However, the court reserved jurisdiction to the extent necessary, in the event of a reversal of the community property finding, to further consider any application by wife for temporary or permanent spousal support. Wife's request for attorney fees was denied; the court retained jurisdiction in case of reversal regarding the community property division.

Findings of fact following retrial after appeal, conclusions of law and a supplemental judgment following retrial after appeal were filed April 25, 1979. This appeal followed.

The 3,100-page transcript contains interesting regional and personal history. In an attempt to keep this opinion in a manageable size, it can be encapsulated.

Jack bought the Patterson property as a young man and worked on it, conducting a riding stable in the summer and cutting Christmas trees in the winter. Beth joined him first as employee and later as his wife. The parties worked exceptionally hard and lived in an incredibly frugal manner so that they could reach the twin goals of maintaining the Tahoe property intact, and purchasing a cattle ranch for a cow-calf operation, which Beth claimed was to be "our ranch."

At the time of the marriage Jack was possessed of separate property of a value of not less than $1,087,500. The value of the Patterson Parcel increased dramatically solely because it was in the path of "progress." Jack made it clear at the time of marriage and for a time thereafter that the Patterson Parcel was not to be sold and that it was to remain his separate property.

Six and eight-tenth acres of the Patterson Parcel were sold to Harrah's Club for $250,000 on December 29, 1959, and the parties jointly worked on subdividing approximately forty acres starting in 1961. Three corporations were formed in 1961 and 1962 in order to effectuate the subdividing of the forty acres. The three corporations were called Crescent V Shopping Center Corporation, Crescent V Apartment Corporation which was later known

as Crescent V Lands, Inc., and Crescent V Enterprises, Inc., now known as Van Sickle Trust No. 1.[5] The share certificates were issued to "Jack Van Sickle, a married man, as his separate property." The share certificates were executed by Jack Van Sickle as president of the corporation and Beth Van Sickle as secretary. These represented all of the outstanding shares for each of the corporations. In reference to why the stock certificates (which covered the transmuted acres) were taken in Jack's name, Beth testified:

> "To the best of, uh, my recollection, I asked him why his name was on there and not my name included. And he said it, uh, it's not necessary for my name to be on there. We are married. It's—it's all the same as one. And, uh, also, he added that with these names, with only one name, it's much more easier managed. So of course I believed him. I mean, why should I doubt him."

The parties maintained separate bank accounts, but after separation one was opened for a short time in both names.

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[5]Shortly after their formation, each of these corporations came to hold certain lots and property in the 40-acre commercial development, a portion of which (Lots 1 through 8) were known as Crescent V Subdivision.

Crescent V Subdivision Lots 5, 6 and 7 (leased for development of apartment units and small stores) and 1, 2 and 3 (still undeveloped as of April 1979) were conveyed to Crescent V Lands, Inc.

Crescent V Subdivision Lots 4 (eventual site of Colony Inn) and 8 (later site of Raley's Shopping Center) were conveyed to Crescent V Shopping Center Corporation.

The Martin/Lake Tahoe Inn Corporation lease, involving approximately five acres (also referred to herein as Parcel No. 15), and the current site of a portion of the Tahoe Inn, was transferred to Crescent V Enterprises, Inc.

Funds from two of the Crescent V corporations (with the help of a separate loan from Jack) were used to purchase a 3,000-plus-acre cattle ranch (Smith Creek-Drumm Ranch), held by said corporations plus another, which the court found to be community property. It was operated at a loss and subsequently sold to avoid foreclosure. It was later repurchased by husband from separate property funds.

SUBSTANTIAL EVIDENCE

In reference to the 40 acres which were subdivided and which are represented by the share certificates in Jack's name, the court found a transmutation. In its findings of fact, the court stated:

> "46. *Prior to 1961, respondent* [*husband*] *conceded to petitioner* [*wife*] *a community interest in what had been his separate property.* The parties agreed that Parcels 13, 14 and 15 of Exhibits '1-A' and '1-B', Item 22 of Exhibit '1-A' and '1-B' and such easements and minor acquisitions as are proximate to the area of such parcels be transmuted into community property. *Such agreement was not expressed orally or in writing, but is implied by all the circumstances and was truly intended by both parties, more particularly by the respondent.* There was no later change or modification of this agreement or intention by the transfer of the properties into the corporations. Since the properties were transferred into the corporations in return for common stock, such stock has become community property." (Emphasis added.)

Part of the court's reasoning is contained in its (preliminary) intended decision:

"The conclusion is inescapable that throughout the first five years of the marriage the parties' efforts were mutually directed toward the preservation and improvement of the Tahoe property. The focal point of activity was the corner adjoining Highway 50 and the State Line, which now is owned by the three corporations (Crescent V Lands, Crescent V Shopping Center and Crescent V Enterprises). This is where the stable was, where the family lived and maintained its home, where the road work was done, and where presumably the heaviest property tax was generated. Fortunately for the parties, the leases were consummated and the financial worries ended. But it is due to the community efforts of the parties that property was held for a sufficient length of time to enable the development to take place. Without it, the Court is confident that this prime portion of the property would have of necessity been sold or disposed of prematurely, to the disadvantage of the parties.

"Somewhere along the line, the iron will of Jack was softened. He was not blind to the realization of Beth's own personal contribution to the property's enrichment. There came a time when he indeed considered a substantial part of the property as 'our property'. He conceded to Beth a community interest in what had been his separate property, and the Court finds that the extent of the concession was the real property which went into the aforementioned three corporations; this was transmuted by agreement of the parties into community property."

The contention is made on this appeal that the evidence was insufficient to support such a finding. In our opinion this position is without merit.

We start with the presumption that the record established evidence to sustain such finding. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) "When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact. [Citations.]" (*Primm v. Primm* (1965) 46 Cal.2d 690, 693, emphasis original.)

Appellant has the duty to make a full statement of the evidence which is claimed to be insufficient to support the findings. His highly selective recitation of the record does not suffice and is sufficient in itself to deny relief. (*In re Marriage of Fink* (1979) 25 Cal.3d 877, 887-888.)

The above quotation of Beth's testimony in reference to the stock certificates, standing alone, is sufficient to sustain the finding of the court and the judgment, as it substantiates the court's finding No. 46 that there was a preexisting intention of Jack to transmute the property to community and the fact that the intent was fully executed. (*Kenney v. Kenney* (1934) 220 Cal. 134, 136.)

As an indication of what slight evidence will justify a finding of a transmutation, see *Woods v. Security-First Nat. Bank* (1956) 46 Cal.2d 697; *Thomasset v. Thomasset* (1953) 122 Cal.App.2d 116, disapproved on another point in *See v. See* (1966) 64 Cal.2d 778, 786; *Long v. Long* (1948) 88 Cal.App.2d 544; and *Estate of Sill* (1932) 121 Cal.App. 202.

While the character of property is fixed at the time it is acquired and is not altered by the occurrence of marriage or by the mere subsequent utilization of the property in the marriage relationship (*In re Marriage of Jafeman* (1972) 29 Cal.App.3d 244, 255, 257), a husband and wife may change the character of property from separate to community by an oral agreement. (*Woods v. Security-First Nat. Bank, supra,* 46 Cal.2d at p. 701; *Estate of Wieling* (1951) 37 Cal.2d 106, 108.) No particular formalities are required for an effective agreement (*James v. Pawsey* (1958) 162 Cal.App.2d 740, 749); the agreement may be either express or implied. (*Estate of Neilson* (1962) 7 Cal. 2d 733, 743; *Mears v. Mears* (1960) 180 Cal.App.2d 484, 499, disapproved on another point in *See v. See, supra,* 64 Cal.2d at p. 785.)

A party's intent to alter the character of his or her separate property may be demonstrated by the nature of the transaction or the surrounding circumstances. (*Title Insurance etc. Co. v. Ingersoll* (1908) 153 Cal. 1, 5-6—money derived from sale of wife's separate property deposited by wife into husband's checking account, used as common fund for over 15 years; *Millington v. Millington* (1968) 259 Cal.App.2d 896, 904-905, 913-914—finding that husband's separate property and community property commingled in separate property business with intent it should all become community property supported by conduct [minimal or no salaries drawn on business by husband and wife] and declarations of husband; *Isom v. Slaughter* (1962) 200 Cal.App.2d 700, 705-707—while realty taken in joint tenancy, community property finding sustained by acknowledgment of husband at time of purchase regarding com-

munity property character and subsequent conduct; *Geller v. Geller* (1953) 115 Cal.App.2d 822, 825—finding that intent of parties that home was community property sustained by direct and circumstantial evidence, i.e., monthly payments came from separate property funds of husband commingled with community property, down payment came from separate property and community property and parties' "clear intention . . . to provide a home for themselves and their children, further support the conclusion that it was their mutual intent that the property be community." (*ibid.*) [husband in Geller a chronic gambler—court noted family only held together as long as it did "by the unselfish efforts and sacrifices of [wife]." (*ibid.*)]; *Long v. Long, supra,* 88 Cal.App.2d 544, 549—separate property lots of husband's upon which house built after marriage impliedly found to have been transmuted to community property by evidence that spouses went into possession of and lived on the property from the date of marriage of date of separation, that house built with community funds and own labor and other property standing in husband's name was regarded as comunity property.)

Beam v. Bank of America (1971) 6 Cal.3d 12, 24, presents a somewhat similar factual situation which was resolved the opposite of the instant case, that is, the trial court held, and the California Supreme Court affirmed, there was no transmutation of husband's two resort business enterprises funded by his separate property inheritance, worth nearly $500,000. Wife testified that husband gathered the family together and presented the idea of the resorts as a "family project" in which he and his wife were to be "partners," and that thereafter she assisted in the plans and manage-

ment. Husband testified, however, that he had no such intention, that he consistently stated in discussions with his wife that he would keep his separate property in his name alone; the evidence showed that the resort enterprises did remain in his name. Hence, the Supreme Court stated that *although the wife's testimony would clearly have been sufficient to support a finding of transmutation, the evidence supported the trial judge's contrary conclusion.* (*Id.*, at p. 25.)

The trial court is entitled to resolve conflicts in testimony by crediting one spouse's testimony over the other's. (*In re Marriage of Jafeman, supra,* 29 Cal.App.3d at p. 258.)[6]

Estate of Sehabiague (1941) 47 Cal.App.2d 793 offers additional guidance. While *Sehabiague* is somewhat distinguishable on its facts (27-year marriage, wife made cash contribution repayments on husband's separate property purchased shortly after marriage, numerous property exchanges followed resulting in all real estate interests merging into an apartment complex; the court held entire apartment complex to be community property), it does contain the following instructive language:

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[6] "'The finding of a trial court that property is either separate or community in character is binding and conclusive on the appellate court if it is supported by sufficient evidence, *or* if it is based on conflicting evidence *or* upon evidence that is subject to different inferences; . . .' (*Mears v. Mears* (1960) 180 Cal.App.2d 484, 500-501 . . . , disapproved on other grounds in *See v. See* (1966) 64 Cal.2d 778, 78 . . . ; see, e.g., *Ford v. Ford* (1969) 276 Cal.App. 2d 9, 12 . . . ; *Millington v. Millington* (1968) 259 Cal.App.2d 896, 915 . . . ; *Somps v. Somps* (1967) 250 Cal.App.2d 328, 336 . . . .)" (*Beam v. Bank of America, supra,* 6 Cal.3d at p. 25, emphasis added; see also *In re Marriage of Gonzales* (1981) 116 Cal.App. 3d 556, 560-561.)

> "In fixing the community interest of a man and wife, where that relationship had extended over a considerable period of their active lives, courts cannot determine the issue from a computation of possible increase of property originally held by one of the parties at the date of marriage alone. There must be considered also the financial contribution of each, and their co-operative business activity; their thrift and sacrifice, the moral responsibility upon which loans may have been obtained, which made possible the expansion of their credit standing, and other values that go into a community aside from the financial contribution, as well as any agreement, express or implied, between the parties. Neither can the fact that title stood in the name of one or the other of the spouses be controlling. [Citations.] . . ." (*Id.*, at p. 797.)

The judicially created doctrine of oral transmutation has been critiqued. (See 7 Witkin, Summary of Cal. Law (8th ed. 1974) Community Property, § 73, p. 5161.) Although we might join in the criticism, any change must come from the Legislature.

Husband contends that the recent case of *In re Marriage of Lucas* (1980) 27 Cal.3d 808 demonstrates that our Supreme Court is moving toward giving more importance to the form of title in marriage dissolution cases. However, *Lucas* does not hold that the presumption arising from the form of title when the husband and wife take real property as joint tenants cannot be overcome by evidence of an agreement or understanding between the parties that the interests were to be otherwise. The court stated at page 815: "[T]he expectations of parties who take title jointly are best protected by presuming that the specified ownership interest is intended *in the absence of an agreement*

or understanding to the contrary." (Emphasis supplied.) Granted, the court did not indicate that the agreement or understanding may be implied. However, in *Marvin v. Marvin* (1976) 18 Cal.3d 660 the court stated at page 684 that in nonmarital relationships "The courts may inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract or implied agreement of partnership or joint venture [citation], or some other tacit understanding between the parties. . . ." We perceive no indication of a movement away from the transmutation cases in *Lucas* and *Marvin*.[7]

Jack contends that the trial court decided that there should be community property and then cast about in order to find a way to designate some. The record does not substantiate this.

The trial court recited several indications of an intent on the part of Jack to transmute the property in question: (1) the "setting"; (2) Hansen Parcel taken in joint tenancy; (3) a conversation in attorney Heim Goldman's office in which community property character of Jack's holdings was discussed and (4) Beth's name as signator for brief time on a joint Crocker-Anglo Bank account in 1964. (We note that the Crocker-Anglo Bank account was opened after separation.) The court noted it was limiting the transmutation to the corporate property "[n]ot for arbitrary reasons, but because these properties were the focal point of the activity and the logical subject of a

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[7]We are aware that *Marvin* was not a transmutation case, but involved the question of whether acquisitions by one of two nonmarital partners could be subject to an express or implied agreement of partnership or joint venture.

transmutation agreement." While the probative value of the evidence is not overwhelming, it, nevertheless, is sufficient to sustain the trial court's findings. (*Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925-926.)

Aside from his overall substantial evidence attack, husband mounts a special attack regarding the finding that Parcel No. 15, the land in the transmuted acreage held by Crescent V Enterprises, Inc., which houses a portion of the Tahoe Inn, was community property. Husband maintains that *absolutely* no evidence exists in the record to support such a finding.

However, all three of the corporations were formed in a fairly short period of time (October 1961 to February 1962), reflected the same directors, the same number of shares issued and the same sole shareholder. The property of all three corporations border on each other and form an overall unit at the Stateline border. The purpose in dividing the area into three corporations was tax and liability protection and the division went according to projects—thus, the shopping center corporation, the apartment (later land) corporation and the other enterprises corporation (now Van Sickle Trust No. 1). While real estate developer James Warren testified he had nothing to do with the development of Parcel No. 15 (later deeded to Crescent V Enterprises, Inc.), but only Parcel Nos. 13 (Crescent V Shopping Center Corporation) and 14 (Crescent V Lands, Inc.), Jack's own testimony on the subject of the formation of the corporations is subject to the inference that he and his then attorney, Max Hoseit, planned and selected the different names and purposes

for the corporations at the same time, that is, they were interwoven. Another factor, probably relied on by the court below in finding Parcel No. 15 (Crescent V Enterprises, Inc.) to be community property was the fact that Crescent V Enterprises, Inc. was apparently the only corporation which paid Beth a salary in the years 1962 to 1964, while Jack was apparently under salary to all three corporations.[8] The parcel was properly found to be community property.

PREMARITAL AGREEMENT

Based on conflicting testimony, the court found that there was no premarital agreement. While an oral, informal agreement executed (confirmed by conduct) subsequent to marriage is enforceable as an agreement settling the property rights of the parties (see 7 Witkin, Summary of Cal. Law, Community Property—Agreement Before Marriage, *supra,* at pp. 5160-5161 and cases cited therein), with the conflicting testimony of Beth and the somewhat inconsistent testimony of Jack on this subject, there is "substantial evidence, contradicted or uncontradicted, to support the finding of fact." (*Robinson v. Pediatric Affiliates Medical Group, Inc.* (1979) 98 Cal.App.3d 907, 910.)

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[8]See reporter's transcript, pages 1743, 1747-1748, 1753.

SETTLEMENT CONTRACT

In the second phase of trial, Jack attempted to reintroduce[9] an unexecuted "antenuptial agreement," and conversations by the parties pertaining thereto. The document was prepared by husband's attorney, Max Hoseit, and discussed by the parties after the separation during a time the parties were contemplating the possibility of a remarriage. Beth had made interlineations on the document.

Evidence Code section 1152, subdivision (a), states as follows:

> "Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his liability for the loss or damage or any part of it."

As explained in 31 California Jurisprudence Third, Evidence, section 210 at pages 266-267 (relied upon by the court in preliminarily rejecting the agreement during the first phase of trial), the statutory exclusion of such offers

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[9]It is interesting to note that at the conclusion of the first phase of trial, one of husband's counsel, just prior to resting his case, offered into evidence "all of the exhibits that remain for identification except the antenuptial agreement (exhibit G), which our further investigation led us to believe it was not properly admissible. . . . We had a discussion in chambers; we concluded it was part of settlement; it is not properly admissible." (Reporter's transcript pp. 2377-2378; see also pp. 2381 and 2432-2433.)

Counsels' withdrawal of the document did not preclude them from reoffering the agreement during the second phase of trial—some 13 months later.

is based on the public policy in favor of the settlement of disputes without litigation, that is, a person is entitled to endeavor to "buy his peace" without fear that his offers of compromise for such purpose will be used against him if not accepted. (*People* ex rel. *Dept. Public Works v. Forster* (1962) 58 Cal.2d 257, 263.) "An offer of compromise between the parties *when accepted* is a complete agreement, which may be admitted in evidence as an admission." (31 Cal.Jur.3d, *op. cit. supra,* at pp. 269-270, emphasis added.)

The trial court found that the document and conversations surrounding it were not admissions. This implied finding that the negotiations were by way of offer of compromise is supported by substantial evidence. (See generally *Rose v. Rose* (1896) 112 Cal. 341; *Walno v. Walno* (1948) 164 Kan. 620 [192 P.2d 165]; cf. *People v. Pollock* (1939) 31 Cal.App.2d 747, 754.)

CORPORATE SALARIES

Husband disputes the court's finding that corporate salaries in the years 1967, 1968 and 1969, in the approximate amount of $46,800, which were not accrued on the books during that period or substantiated by any corporate minutes, should not be now credited to him. He argues there was no showing of any intent on his part to waive the unpaid salaries.

As pointed out by wife, considerable testimony was taken on the issue by the court in the closing days of trial in the second phase. Wife maintains that under the appellate standard of review regarding findings of fact ("the power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence

contradicted or uncontradicted which will support the finding" (*Primm v. Primm, supra,* 46 Cal.2d at p. 693, emphasis original)) the resolution by the trial court on this issue should be affirmed.

There was a tremendous financial drain on the corporations during the period in question by the Smith Creek Ranch. There was no accrual of salary on the books of the corporations, there is a lack of corporate minutes for that period, and no notation of salaries was noted on state or federal tax returns (the latter is explainable by the presence of Internal Revenue Code section 267, which would disallow a deduction unless the salaries were paid within 75 days of the end of the year).

Although W. P. Garrison, the corporations' accountant during the period, testified that the wages were not waived, he made no notation of such, and the accountant for the corporations commencing in 1970 testified that he was not given instructions by Jack, Jack's attorney or by Garrison as to Jack's corporate salaries. Garrison conceded he gave no such instructions to his successor.

Husband argues that "[a]n officer rendering beneficial services to a corporation is entitled to recover the reasonable value of his services even if there were no action of the board of directors fixing his salary so long as the circumstances negate any intention that the officer rendered those services gratuitously," and cites several cases in support of his argument.

The cases cited by husband are distinguishable. *Rosborough v. The Shasta River Canal Co.* (1863) 22 Cal. 556 dealt with the retroactivity of a *board order* authorizing a

salary to plaintiff regarding services previously rendered during a period there was no written agreement. *Bassett v. Fairchild* (1901) 132 Cal. 637 held that the presumption that directors of corporations render their services gratuitously, in the absence of a previous express contract, does not apply to *onerous services*, not pertaining to the office of director, which could not reasonably be expected to be performed for nothing, *although no compensation had previously been fixed* (director/manager also acted as land commissioner of a land grant railroad company and developer of its mining corporation). In the instant case, the court apparently drew the inference that corporate activity had somewhat come to a standstill during the 1967-1969 period because of the huge financial drain of the Smith Creek Ranch, which was purchased by a partnership of the corporations. Since no board meetings were even held during the period in question no contention regarding Jack having rendered "onerous services" could ever be substantiated.

Wilson v. Red Bluff Daily News (1965) 237 Cal.App.2d 87 is also distinguishable. The pertinent issue involved whether it was proper to go behind language which *appeared in corporate minutes* concerning certain compensation to be paid to a corporate vice president who also acted as manager. The court held the corporation should not be estopped and it was determined that the parties understood the compensation to be paid to the vice president/manager was to be paid for managerial services and the officer was not entitled to compensation as a vice president after his employment as manager terminated. The court noted:

> "Whether a corporate officer is entitled to compensation depends on the intention of the parties (*Caminetti v. Prudence etc. Ins. Assn.*, 62 Cal.App.2d 945, 951 . . . ; 5 Fletcher, Cyc. Corp., § 2111 (perm.ed.rev.repl. 1952).) The parties may manifest their intention in any of the usual ways, that is, by formal contract, by resolution or simply by their actions." (*Id.*, at p. 91.)

It appears that the parties' "inaction" could also be added to the above quotation.

Finally, in *Caminetti v. Prudence etc. Ins. Assn.* (1944) 62 Cal.App.2d 945, the state insurance commissioner was appointed conservator of an insurance company in which a husband and wife acted as officers and directors, and then later relieved. A dispute as to certain unpaid corporate salaries arose on the insurance commissioner's appeal to have the conservatorship reinstated and the husband and wife's award of additional back salaries at the trial level was affirmed. The facts reflected that for a four-year period, the board of directors (husband, wife and another) met once a year and adopted written resolutions regarding salaries for certain board positions. Once the conservatorship was imposed a resolution was adopted setting salaries for the positions at a much lower sum "during the existing emergency." Following this husband moved into different positions in the corporation for which salaries had not been set. In light of the change in position by the husband and the limitation on salaries during the "emergency," the court held that the amount accepted by husband as a partial compromise of his claim against the corporation for salaries was not a "waiver" of his right to demand full payment for his services since such partial

payments were never intended by the parties as full payment. The court further concluded that the amount of salary drawn by husband added to the amount paid in compromise was equivalent to the reasonable value of husband's services during the period. In *Caminetti*, the court had evidence before it that the parties drew a monthly salary during the period in question (1936-1939) within the $200 per month limit *so there was salary activity reported on the books every month—no gaps.*

No showing of any extraordinary services by Jack as president during the 1967 to 1969 period as president of the corporations was shown on the record, so the quasi-contract recovery allowed in *Bassett* is not applicable. The two-and-a-half-year gap in corporate books and on tax returns regarding salaries and no minutes distinguishes the instant case from *Caminetti*, where the court held all of the circumstances (including the continuous limited salary draw) negatived an intent that continuing services were gratuitous. (See generally, 6 Witkin, Summary of Cal. Law, Corporations—Compensation, *supra*, at pp. 4372-4373; 19 Am.Jur.2d, Corporations, § 1401 et seq.)

The record demonstrates that the trial court gave Jack's counsel every opportunity to give the court the evidence it needed to credit the salaries to Jack at the time of trial. The court's finding of no substantial evidence to support such a conclusion is based upon strong evidence.

INVESTIGATOR AND LEGAL FEES

On the subject of the husband's legal or investigating fees in connection with a criminal action and the parties' various divorce proceedings, the court disallowed any reimbursement.

Jack claims an unspecified amount of attorney fees; further, he does not mention *which* attorney fees he is asking to be reimbursed for—he employed several attorneys in California and Nevada, including his counsel at time of appeal, in regard to the criminal charges.[10] Husband argues the attorney fees and costs were paid to avoid his extradition to California to face criminal charges (conspiracy to commit murder of his wife, the trial judge and certain attorneys involved in the child custody matter) which were ultimately dismissed. Husband claims he "paid those fees so that he would not be incarcerated and so that he could operate the community property corporations." Husband claims that "it was necessary for the success of the corporations that he spend the funds which were spent in defense of the criminal charges"; he apparently does not recall his own testimony that during the time he was incarcerated he ran the business of the corporations, through counsel, with almost no problems.[11]

Husband further argues that $15,544.68 in investigator fees were improperly disallowed. $10,000 of the amount pertained to investigation of Beth by a Mr. Nicholas, at

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[10]From Jack's testimony at the second phase of trial, it appears his present counsel billed him $15,085 regarding the criminal matter in Nevada and the Nevada attorneys, Echeverria, Claiborne and Grubic billed him somewhere between $80,000 and $100,000.

[11]Reporter's transcript pages 2639-2643.

Jack's Nevada attorneys' behest, regarding her fitness as a parent prior to the 13-day 1968 custody trial. The other $5,500 was spent in investigator fees by husband's present attorneys *after* Beth was awarded custody, while husband and his present trial/appellate attorneys were trying to locate Beth in California to secure visitation for Jack in Nevada. Apparently Beth had been advised by law enforcement to move, hire a bodyguard (which she did) and keep her address secret following the conspiracy to commit murder indictment. Husband spent the money to locate Beth rather than submit himself to the jurisdiction of California courts in a petition to obtain such visitation while under indictment.

The above factual summary is mainly gleaned from statements of counsel. There is almost a complete lack of a record that is a part of this appeal which may be reviewed to determine whether the court's discretionary disallowance of the items is supported by the record. Such allowance or disallowance is particularly within the discretion of the trial court.

The judgment is affirmed. Wife is awarded her costs on appeal. Each party shall assume his/her own attorney fees for said appeal.

/s/ ANDREEN
J.

WE CONCUR:

/s/ FRANSON
Acting P. J.

/s/ PETTITT
J.*

*Assigned by the Chairperson of the Judicial Council.

Appendix B

In the
Court of Appeal of the
State of California

In and for the
Fifth Appellate District

5 Civil No. 4991
(Super. Ct. No. 185679)

In re the Marriage of
Beth and Jack Van Sickle.

Beth Van Sickle,
Appellant,
vs.
Jack Van Sickle,
Appellant.

ORDER
[Filed Dec. 9, 1981]

The petition for rehearing filed herein is denied.

Dated December 9, 1981

I Concur:
ANDREEN

FRANSON
Acting P.J.

Appendix C

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

Jan 20 1982

I have this day filed Order

Hearing Denied

In re: 5 Civ. No. 4991

Beth Van Sickle

vs.

Jack Van Sickle

Respectfully,

Clerk

Opposition

No. 81-1956

Office Supreme Court, U.S.
FILED
MAY 24 1982
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court

of the

United States

October Term, 1981

Jack Van Sickle,

Petitioner,

vs.

Beth Van Sickle,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

to the Court of Appeal, State of California

Fifth Appellate District

BRIEF IN OPPOSITION

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No. 81-1956

In the Supreme Court

of the

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October Term, 1981

Jack Van Sickle,

Petitioner,

vs.

Beth Van Sickle,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

to the Court of Appeal, State of California

Fifth Appellate District

BRIEF IN OPPOSITION

JURISDICTIONAL STATEMENT

United States Supreme Court Rules 12 and 15 require Petitioner to provide a

statement of the grounds on which jurisdiction is invoked, the stage of proceedings where the issues were first raised, and the way in which they were passed upon. These rules are seemingly enacted in order to avoid meaningless waste of time by this Honorable Court. It is respectfully contended that Petitioner cannot strictly follow these rules as such would show that there were no discussions regarding Constitutional issues at any stage below.

Petitioner's Subject Index presented to the California Supreme Court makes no mention of a Constitutional question and of the ten subjects raised, there was no issue relating to such.

Petitioner's argument requesting a Hearing by the State Supreme Court was thirty-seven pages long, with only one reference to the U. S. Constitution made in

passing, without supporting argument, in Petitioner's Conclusion. In Petitioner's "Table of Authorities Cited" there was no mention of either the State or the U. S. Constitution, and the sole reference to any such issue is contained in the Conclusion by the following single sentence:

"Now the Court of Appeal, by affirming the trial court's decision, has extended that doctrine (transmutation) to an implied intent to transmute separate property to community property without an agreement or understanding and has denied Jack Van Sickle due process of law as provided by the 14th Amendment to the United States Constitution and Article 1, section 7 of the California Constitution. Jack Van Sickle's real property has been taken from him in violation of Article 1, section 21 of the California Constitution

which provides in part: 'Property awarded (sic) before marriage...is separate property.'"

There was no further mention of any U. S. Contitutional, State Constitutional or federal issues. The foregoing is the sum total of all that Petitioner has argued before the Courts below, which fully exposes the fact that Petitioner could not argue or demonstrate "Constitutional Issues".

CONSTITUTIONAL AND STATUTORY ISSUES

In McCarty v. McCarty, 453 U.S. 210, 69 L.Ed.2d 589, 101 S.Ct. 2728 (1981), which was an unusual exception to the general rule that matters of inter-spousal martial contracts are controlled by State Law, the United States Supreme Court states at 220:

"The whole subject of the domestic relations of husband and wife...belongs

the to laws of the States and not to the laws of the United States. Hisquierdo v. Hisquierdo, 439 U.S. 572, 581, 99 S.Ct. 802, 808 (1978)."

In McCarty (supra) the Dissent of Justice Rehnquist mentions at 274 that in only five previous cases of this nature has the U.S. Supreme Court found preemption of State law.

In this case, the contention by Petitioner is not that State law regarding transmutation by agreement violates the U.S. Constitution, but rather that the Trial Judge did not understand California law and sought to make new law. Not only is such contention unsound, it is not the type of issue which confers jurisdiction in this Court. An objection is therefore made on jurisdictional grounds.

STATEMENT OF THE CASE

This case has been in litigation for 14 years, with Appellant Jack Van Sickle employing various counsel for multiple appeals. In this case, Jack Van Sickle (hereinafter "Jack") has decided to appeal and re-appeal each and every aspect of this case, just as a matter of course. There have been three progressive trials and three sets of appeals by Jack.

The fundamental error made by Jack is that he argues on appeal, over and over, the facts of the case, inviting the Appellate Courts to debate. Furthermore, Jack argues new law is being made (not that such would be unconstitutional or a denial of due process) and that there was no agreement of the parties, merely an implied agreement that the community earned. Findings of Fact Number 46 Appendix page A-10 shows that the parties agreed, and that such agreement was truly intented by both

Jack and Beth and more particularly by Jack, with there being no later change or modification of the agreement by transfer of property into the corporations.

In prior briefs before the Court of Appeal and particularly in the briefs submitted in the second appeal by Jack, In Re the Marriage of Van Sickle (1977) 68 Cal. App. 3d 728, Beth Van Sickle (hereinafter "Beth") took the position that there is a presumption that the record contains evidence to support a finding, and that Jack's briefs failed to comply with the rules of court and law which requires an appellant to demonstrate that there is no substantial evidence to support a challenged finding of fact.

The foregoing presumption and waiver law is cited by the Fifth District Court of Appeal in reference to Foreman and Clark Corp v Fallon (1971) 3 Cal.3d 875

which has remained the controlling law during the preparation of Jack's last two appeals. The opinion of the Fifth District Court of Appeal likewise cites Primm v Primm (1956) 46 Cal. 2d 690 and In Re the Marriage of Fink (1979) 25 Cal. 3d 877.

As the Court stated at Appendix, page A-12:

"Appellant has the duty to make a full statement of the evidence which is claimed to be insufficient to support the findings. His highly selective recitation of the record does not suffice and is sufficient in itself to deny relief. (Citation)"

EXTENSIVE EVIDENCE

Notwithstanding the fact that there was a waiver of any alleged error by virtue of the selective recitations made by appellant, the Fifth District Court of Appeal went on to show that there was sufficient

evidence to support the findings.

An interesting aside is the fact that with all of the trials, none of which in any way kept Jack from presenting his case, and with all of the Appeals, and all of the legal processes he has used IN WELL OVER A DECADE OF LITIGATION, he now claims a lack of Due Process in one sentence.

In an attempt to clarify, once and for all, that the position taken by Jack is unsound, the Fifth District quoted on Appendix pages A-10 and A-11 the very Findings of Fact and Trial Court's reasoning which show the true and real intention by Jack to convey to Beth her community interest. This is not a case of the court finding that community proprty was "earned" by any "substantial justice" theory as claimed by Jack, it is a case where the Court enforced the intent of the parties as shown by their own actions and

own documents, being recognized by the court.

In addition to the Court's Findings of Fact and Intended Decision quoted above, there is one conclusive point on this subject as to whether there was truly an agreement, versus some other form of "earning" through "substantial justice." The one controlling part of the record which cannot be denied, is the fact that Conclusion of Law number 5 (clerks transcript page 52) states:

"5. By Agreement of the parties there was a transmutation of a portion of the real properties that were formerly Jack Van Sickle's separate property." (emphasis added)

This is the only Conclusion of Law which states that transmutation occurred, and it clearly states that it was by AGREEMENT, not by some fictitious

earning through substantial justice. There can be no doubt that the Court followed existing State law regarding transmutation as set forth in the Appendix to the subject Petition A-13 through A-17.

REASONS FOR CERTIORARI

There appears to be no valid reason for this Court to grant the Petition. For that matter, the McCarty case (supra) would seem to contain strong policy for not reviewing this type of case. The record, by the nature of this case, is so devoid of any Federal Questions as to make any review thereon, an exercise in speculation. If this type of case were to be granted a Hearing, many domestic law cases with a heated dispute would follow.

CONCLUSION

The case at bar is not notable except as to the extreme sacrifices made by the parties early in the marriage to save

and develop the property. Since the Court was following well established State law, the Court of Appeal did not publish its decision, and it is thus not precedent. The claim that this case somehow establishes new law has been shown to be without merit.

WHEREFORE, it is respectfully requested that the Petition for Hearing be denied on the basis that there is no basis for jurisdiction, there exists ample evidence to support the Order of Court, and there is no logical or possible record to support any claimed Constitutional question or error.

It is further respectfully requested that the Court Below having awarded Costs on Appeal, that the United States Supreme Court likewise order Petitioner to pay this Respondent her Costs on Appeal.

Dated: May 17, 1982

Respectfully submitted,

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